

The Honorable BARBARA J. ROTHSTEIN

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

AMEENJOHN STANIKZY,

Plaintiff,

v.

PROGRESSIVE DIRECT INSURANCE  
COMPANY,

Defendant.

NO. 2:20-CV-00118 BJR

UNOPPOSED LCR 7(d)(1) MOTION FOR  
SETTLEMENT CLASS CERTIFICATION  
AND MOTION FOR PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT.

Noting Date: September 7, 2021

**I. MOTION/RELIEF REQUESTED**

Plaintiffs Ameenjohn Stanikzy, Niklas Steidl, and Jon Mackay, on behalf of themselves and the proposed Settlement Class, respectfully moves the Court for entry of a proposed Settlement Class Certification and Preliminary Approval Order which:

- 1) Grants certification of the above-entitled matter as a settlement Class;
- 2) Grant preliminary approval of the Settlement Agreement (“Settlement”) between Plaintiffs Progressive Direct Insurance Company (“Progressive”) (filed at Dkt#65-1 hereto)
- 3) Approve and direct implementation of the proposed notice plan and dissemination of an approved mailed notice; and

1           4)       Schedule a final fairness hearing.

2           The motion is unopposed and as such is filed under LCR 7(d)(1). Plaintiffs expressly  
3 note that the requested settlement class certification is solely for settlement purposes; Progressive  
4 in no way concedes the certifiability of a *litigation class* in this matter.  
5

6           THIS MOTION is submitted pursuant to FRCP 23, the procedure and criteria for  
7 preliminary approval as stated in the *Manual for Complex Litigation – Fourth* (Federal Judicial  
8 Center 2004) (hereinafter the “*Manual*”) § 21.6, and the legal rules laid out in *In re Hyundai &*  
9 *Kia Fuel Econ. Litig.*, 926 F.3d 539, 556 (9th Cir. 2019) (*en banc*) (“*In Re Hyundai*”). The  
10 Settlement Agreement (“Settlement”), proposed form of notice (“Notice”), and claim form  
11 accompany this Motion. (Dkt#65-1).  
12

## 13                               II. OVERVIEW OF THE SETTLEMENT TERMS

14           The proposed settlement class – other than the respective time frame of claims covered  
15 (the settlement is capped at claims having accrued by July 11, 2021, which is the date that  
16 Progressive ceased taking a “projected sold adjustment” deduction in Washington State on  
17 Mitchell estimates) - is *identical* to that earlier proposed in Plaintiffs’ Motion for Class  
18 Certification (*see* Dkt#37 at 1-2) and is:  
19

20           All Progressive insureds with Washington first party personal line policies issued  
21 in Washington State, who received compensation for the total loss of their own  
22 vehicles under their First Party (Comprehensive, Collision, and UIM) coverages,  
23 and who received a total loss valuation from Mitchell based upon the value of  
comparable vehicles which took a deduction for a “Projected Sold Adjustment.”

24           Excluded from the Class would be (a) the assigned Judge, the Judge's staff and  
25 family, and Progressive employees, (b) claims for accidents with dates of loss  
26 occurring before January 24, 2014, (c) claims on “non-owned” (borrowed or  
27 rented) vehicles; (d) claims where the insured submitted written evidence  
28 supporting a different valuation, and the amount of that different valuation  
submitted by the insured was paid by Progressive or valuation paid was  
determined using the appraisal clause.

1 The Proposed Settlement is the result of extensive work by the parties, and a case that  
 2 was substantially advanced at the time of resolution. The parties have proceeded through Rule  
 3 12 motions, completed Class Certification fact discovery, and respectively have filed their  
 4 Motion for Class Certification and Progressive's Oppositions thereto. As part of this discovery  
 5 Progressive had identified the (slightly overinclusive) class size, and via sampling 60 random  
 6 claims Plaintiffs were able to determine, how overinclusive the class size was, and the average  
 7 amounts that had been deducted for "projected sold adjustment" on Mitchell Market Survey  
 8 Reports, when the deduction was taken.

10  
 11 Thereafter, the parties conducted a zoom mediation with the Honorable Bruce Hilyer  
 12 (Ret.). With Judge Hilyer's assistance, they reached agreement on key terms, and only then  
 13 discussed secondary issues such as fees, resulting in the Settlement now being presented for  
 14 Preliminary Approval.

15 Because the settlement class period ends at July 11, 2021, and a (slightly over-inclusive)  
 16 class list has been generated by Progressive, and because Plaintiffs sampled sixty (60) randomly  
 17 selected claims produced in discovery in this matter, which allowed them to determine how over-  
 18 inclusive the list was and the average deduction for "projected sold adjustment", the agreed  
 19 settlement fund in this matter available to pay claims of Class Members (approximately  
 20 \$19,228,696.06) reflects a reasonable estimate of the amounts not paid by Progressive due to the  
 21 use of a "projected sold adjustment" in valuing total loss vehicles.<sup>1</sup> Progressive agrees to the use  
 22 of this estimate for purposes of settlement, but reserves all rights and arguments as to whether  
 23  
 24  
 25

---

26  
 27  
 28 <sup>1</sup> This settlement amounts are based upon 93.33% of the claims on the Class List being within the  
 Settlement Class and the average deduction for PSA being 7.4% of the market value of the  
 vehicle otherwise being determined on the Mitchell "Market Survey Report."

1 such an estimate could be the appropriate basis of damages in the event of litigation.

2 Over 22,000 claims potentially fall within the proposed Class and will be provided notice  
3 and a claims form. The parties propose that notice and color contrasting pre-populated claims  
4 forms will be mailed first class to members of the Settlement Class within 60 days of preliminary  
5 approval (Dkt#65-2; Settlement ¶45). For those notices that are returned as undeliverable, notice  
6 will either be re-mailed to those with return addresses or will be e-mailed to those without a  
7 return address where Progressive has provided an e-mail. The website will include key  
8 documents, allow for the submission of claims electronically, and will contain updates on the  
9 progress of the Settlement Process.  
10

11 The agreed claims period is 100 days (Settlement ¶4, 34) with claims being submittable  
12 either on the personalized pre-printed claims form provided with the notice, or electronically on  
13 the Settlement website. The claims form is simple, asking three “Y/N” questions to obtain  
14 information that Class Members are likely to have or have known, while providing an option of  
15 answering “I don’t know”, which will not be used against them under the Settlement Agreement.  
16 This information will assist Progressive in determining any claims that fall outside of the  
17 Settlement Class or are otherwise not eligible for payment. Those who submit timely valid  
18 claims will be paid 7.4% of the Mitchell Market value of their vehicle, minus a pro-rata  
19 deduction for costs and fees.<sup>2</sup>  
20  
21  
22

---

23  
24  
25 <sup>2</sup> Under the Settlement, consistent with Plaintiffs’ theory of liability, to the extent that  
26 Progressive can show that it paid MORE than the value shown on the Mitchell Report, it may  
27 reduce these payments, or if the valuation Progressive paid is more than the Mitchell Value with  
28 the “projected sold adjustment” added back in, the claimant would not be entitled to a payment  
for the “projected sold adjustment”. The parties anticipate that these situations, if they exists,  
will be rare, with no examples of them existing in the random sample of sixty claims reviewed  
by the Parties.

Under the Settlement, Class Counsel can request a common benefit fee of up to 26% of the common fund, costs of \$24,366, and a class representative bonus of \$10,000 for each of the proposed Class Representatives. (Settlement ¶51). These terms were only discussed through the mediator, Judge Hilyer, and then only after all other key terms were agreed. The settlement terms, recovery, and claims process is similar to those in prior total loss settlements in Washington addressing similar claims practices.<sup>3</sup>

The parties Settlement proposes an opt-out and objection deadline of two weeks (14 days) *before* the final approval hearing date, with the final approval hearing being set roughly 60 days after notice is mailed. This provides a roughly 45 day opt-out/objection period. As such, if preliminary approval is granted, the final approval hearing would be set *on or after seventeen (17) weeks after the date of preliminary approval*.<sup>4</sup> The parties note that while the proposed notice (Dkt#65-2) is drafted with the final approval hearing location as the Seattle Courthouse, that can be changed to either Washington DC where this Court sits, or can be scheduled to occur remotely, either in the notice itself, or by changing the location and posting the change on the Settlement website.

### III. RELEVANT PROCEDURAL HISTORY

This matter was filed on January 24, 2020 asserting claims against Progressive for breach of contract and violations of the Washington Consumer Protection Act, WAC 284-30-391, RCW 19.86 et seq. On February 3, 2020, Plaintiff Stanikzy filed an Amended Class Action Complaint

---

<sup>3</sup> *E.g. Stier v. PEMCO Mut. Ins. Co.*, No. 18-2-08153-5 (Pierce County Wa. Sup. Ct., April 7, 2021) (granting final approval); *Tereshchenko v. AmFam*, No. 19-2-07123-6 (Pierce County Wa. Sup. Ct., February 6, 2021) (granting final approval).

<sup>4</sup> Seventeen weeks is 60 days (for mailing) + 45 days (opt-out/objections) + 14 days to the final approval hearing.

(the “Complaint”), served upon Defendant, which is the operative Complaint in this Action. Progressive moved to dismiss, and compel appraisal, which was rejected by this Court on May 29, 2020 (Dkt#30).

Subsequently, Plaintiff conducted substantial discovery of Progressive, including the production of a class list, sample of sixty (60) claims, depositions of Progressive witnesses, and the production of documents and interrogatory answers. Based upon this material, Plaintiffs moved for Class Certification on September 11, 2020. (Dkt#37, 38). Progressive deposed Mr. Stanikzy, and Plaintiff’s expert, and served discovery on Plaintiffs.

On November 30, 2020 Plaintiffs moved (Dkt#47) to amend their Motion for Class Certification to added Mr. Niklas Steidl and Jon Mackay as additional Class representatives. This motion was granted on January 4, 2021 (Dkt#49), and Progressive then deposed Mr. Steidl and Mr. Mackay.

Progressive subsequently filed a comprehensive Opposition to Class Certification on April 26, 2021. (Dkt#58, 59, 60). After this filing, the parties agreed to mediate the matter, agreeing on Judge Hilyer as the mediator. After the mediation, and the key terms being reduced to writing, the parties filed a notice of Settlement with this Court on May 18, 2021 (Dkt#62) and proceeded to draft the Settlement Documents. An update on the status of preparing the settlement documents was filed on July 30, 2021 (Dkt#64).

#### IV. THE APPROVAL PROCESS

Approval of a class action settlement involves a two-step process. The first step in a case like this *which has not already been certified by the Court for litigation* as a Class (where a sufficient showing is made) is for the Court to grant *settlement* class certification and preliminary approval of the settlement which allows notice of the proposed settlement (and claims forms) to

1 be sent to class members. *In re Hyundai*, 926 F.3d at 554<sup>5</sup>. The second step is for the Court to  
 2 then consider the response of the Class to the settlement and notice, as well as the request for  
 3 fees, costs, and incentive awards, at the time of final approval. *Id.* at 555, *Manual* § 21.61  
 4

5 There is a “strong judicial policy that favors settlements, particularly where complex  
 6 class action litigation is concerned” *In re Hyundai*, 926 F.3d at 556 (quoting *Allen v. Bedolla*,  
 7 787 F.3d 1218, 1223 (9th Cir. 2015) (quoting *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101  
 8 (9th Cir. 2008)).

9 Neither formal notice nor a hearing is required at the preliminary approval/provisional  
 10 class certification stage: the Court may grant such relief upon an informal application by the  
 11 settling parties and may conduct any necessary hearing in court or in chambers, at the Court’s  
 12 discretion. *Manual* § 21.61. As such, the parties have submitted this Motion under LR 7(d)(1)  
 13 and have set the dates in the Proposed Order to run from the date the proposed order is signed  
 14 with a final approval date to be filled in by this Court for a date on or after 17 weeks after the  
 15 date the proposed order is signed.  
 16  
 17

## 18 **V. THE MOTION SHOULD BE GRANTED**

### 19 ***A. Conditional Certification of the Settlement Class Should be Granted.***

20 As noted above, on file with this Court (Dkt# 37, 38, 39) is a comprehensive submission  
 21 showing by Plaintiffs as to how certification is appropriate, and *settlement* class certification is  
 22  
 23  
 24  
 25  
 26

27 <sup>5</sup> The purpose of this Court’s preliminary evaluation is to determine whether 1) the Settlement  
 28 falls within the “range of reasonableness;” and 2) as a result, whether notice to the Potential  
 Class Members of the terms and conditions of the Settlement and the scheduling of a Final  
 Settlement Hearing is worthwhile. *Newberg* § 11.25 at 11-36, 11-37

1 particularly appropriate here given the relevant legal standard.<sup>6</sup>

2 "The criteria for class certification are applied differently in litigation classes and  
3 settlement classes." *In re Hyundai*, 926 F.3d at 556. In considering a *litigation* class, the court  
4 "must be concerned with manageability at trial," whereas in considering a *settlement* class, "such  
5 manageability is not a concern . . . [because], by definition, there will be no trial." *Id.* at 556-57.  
6 (Italics added). "[I]n deciding whether to certify a settlement class, a district court must give  
7 heightened attention to the definition of the class or subclasses." *Id.* at 557. Here, notably there  
8 are no sub-classes, and every single insured is treated identically under the settlement, with the  
9 Settlement being similar in material respects to prior total loss settlements.  
10

11  
12 *In re Hyundai* involved a *nationwide* claims-made settlement with a 23% claims rate  
13 prior to final approval. *Id.* at 555. The *en banc* ruling notes that the requirement of "heightened  
14 attention" to the settlement class definition arises because "a court asked to certify a settlement  
15 class will lack the opportunity, present when a case is litigated, to adjust the class, informed by  
16 the proceedings as they unfold" *id.* at 557 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S.  
17 591, 620 (1997)) as a result of the fact that in the "usual case" the settlement is reached "without  
18 the benefit of adversarial investigation." *Id.*; (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,  
19 1021 (9th Cir. 1998). As such,  
20

21 the aspects of Rule 23(a) and (b) that are important to certifying a settlement class  
22 are "those designed to protect absentees by blocking unwarranted or overbroad  
23 class definitions." [*Amchem*, 521 U.S. at 620]. The focus is "on whether a  
24 proposed class has sufficient unity so that absent members can fairly be bound by  
25 decisions of class representatives." *Id.* at 621

---

26  
27  
28 <sup>6</sup> Plaintiffs note that under the Settlement Progressive's agreement to settlement certification only  
extends if the settlement is finally approved and completed, any settlement certification would be  
null and void in the event the settlement is not completed. (See Settlement ¶¶53-57, 71-74).



1 *In re Hyundai.*, 926 F.3d at 558.

2 Here, the proposed settlement class definition at issue, and the underlying facts  
 3 supporting it, are well developed, and have been tested repeatedly by multiple courts, most  
 4 recently with a similar class definition being certified by Judge Pechman as to the similar taking  
 5 by State Farm of an “ask-to-sold” deduction on total losses in Washington. See *Kelley v. State*  
 6 *Farm Mut. Auto Ins. Co.*, No. C20-454-MJP, Dkt#136 (W.D. Wa July 1, 2021) (Order Certifying  
 7 Class). As such, the concerns pertaining to the absence of “adversarial investigation” –  
 8 particularly given the extensive discovery and then filing of a motion for class certification - do  
 9 not present themselves in any respect in this case. This is a case where no class definition  
 10 problems exist, and settlement class certification is appropriate. See *In re Hyundai.*, 926 F.3d at  
 11 559 (noting that there were no conflicts between current and future claimants to the limited fund  
 12 as in *Amchem*, and as such settlement certification was appropriate).

13 Because each of the Rule 23(a) and 23(b) requirements have been shown in Plaintiff’s  
 14 earlier submission, and in light of the standard applicable to settlement certification, Settlement  
 15 certification should be granted.<sup>7</sup>

16 ***B. Preliminary Approval Should Be Granted.***

17 At the preliminary approval stage, a court "must make a preliminary determination on the  
 18 fairness, reasonableness, and adequacy of the settlement terms [under Rule 23(e)(2)] and must  
 19 direct the preparation of notice of the certification, proposed settlement, and date of the final  
 20 fairness hearing." *Manual* § 21.632. In making this latter determination, a court's role is to

---

21  
 22  
 23  
 24  
 25  
 26  
 27 <sup>7</sup> Plaintiffs note that differences in the amounts of damages, the amounts of which are the only  
 28 thing that will vary between Settlement Class Members, do not defeat predominance in a  
 settlement context. *In re Hyundai.*, 926 F.3d at 560-561.

1 ensure that the proposed settlement falls within the "range of reasonableness" under Rule  
 2 23(e)(2) such that proceeding with notice to class members and a formal fairness hearing would  
 3 be worthwhile. 4 *Newberg on Class Actions* § 11:26 (4th ed. 2002).

5 In making its preliminary determination, the court "consider[s] the overall fairness of 'the  
 6 settlement taken as a whole, rather than the individual component parts,' because '[n]either the  
 7 district court nor this court ha[s] the ability to 'delete, modify or substitute certain provisions.'"  
 8 *In re Hyundai.*, 926 F.3d at 569 [quoting, 150 F.3d at 1026] and looks to those of the familiar  
 9 factors which apply:

10 [T]he strength of the plaintiffs' case; the risk, expense, complexity, and likely  
 11 duration of further litigation; the risk of maintaining class action status throughout  
 12 the trial; the amount offered in settlement; the extent of discovery completed and  
 13 the stage of the proceedings; the experience and views of counsel; the presence of  
 14 a governmental participant; and the reaction of the class members to the proposed  
 settlement.

15 *Hanlon*, 150 F.3d at 1026 (citing *Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375  
 16 (9th Cir. 1993)).

17 The proposed settlement here provides an excellent resolution to this litigation, warranting  
 18 preliminary approval and submission to the Class for its consideration. It would resolve this  
 19 matter, providing an end to hard-fought litigation. The settlement follows a structure what has  
 20 been used in prior settlements approved by Washington Courts. See *Supra*, n.3.

22 Where, as in prior cases with approval of nearly identical settlements, a preliminary  
 23 evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other  
 24 obvious deficiencies, such as unduly preferential treatment of class representatives or segments of  
 25 the class, or excessive compensation for attorneys and appears to fall within the range of possible  
 26 approval, the Court should direct that notice be given to the class members of a formal fairness  
 27 hearing, and the terms of the settlement, and their rights to file a claim, opt-out, or object. *Manual*  
 28

1 4th § 21.632. At that time, arguments and evidence may be presented in support of or in  
 2 opposition to the settlement, and the Court will have a full record to rule on the settlement.

3 *Manual 4th §§ 21.632 & 21.633.*

4  
 5 *1. The Settlement is the Product of Arm's-Length Negotiations*

6 The proposed settlement is the result of a mediation followed by several months of  
 7 exchange of settlement papers between the attorneys who were well-familiar with the legal and  
 8 factual issues of the case due to their involvement in the litigation in this case, and with Plaintiffs'  
 9 Counsel prior similar litigation. Fees, costs, and any bonus for the Class Representative were  
 10 discussed only after all other material terms were agreed.

11  
 12 Class Counsel and defense counsel have decades of combined experience in the litigation  
 13 and settlement of class actions (including multi-state class actions). In preparing the case for class  
 14 certification, and prior to negotiating the settlement, Class Counsel conducted extensive work and  
 15 completed discovery regarding the extent and value of the Class claims. Based upon their  
 16 extensive work up of the case, Class Counsel support the Settlement as fair and reasonable and as  
 17 prompt possible monetary relief to the members of the Class.

18  
 19 Progressive has likewise consulted its counsel and wishes to resolve this total loss  
 20 litigation and the resulting potential exposure in Washington State. After extensive discussions  
 21 with Plaintiffs' counsel it has produced the Class list upon which the settlement was based, and  
 22 after extensive analysis of the facts and results in prior cases, and to avoid the risk and expense of  
 23 further litigation, without waiving its defenses, or agreeing that it has any liability, Progressive has  
 24 agreed to the proposed settlement.

25  
 26 *2. The Settlement Provides Reasonable Relief to Class Members*

27 As with other recent total loss settlements (involving both the Mitchell "projected sold  
 28

adjustment” deduction and the related Audatex “typical negotiation adjustment”) negotiated by Proposed Class Counsel, this is not a “one size fits all” settlement. The proposed settlement provides for actual cash compensation to all eligible Class Members who submit a valid claim form on a *proportional* basis, based upon each Class Member’s vehicle value and the average percentage projected sold adjustment deduction to distribute settlement payments. As a result, the more valuable a class members’ vehicle, the higher the recovery. Given the relatively small size of the claims at issue (settlement payments will be on average in the range of \$500 per Class Member)<sup>8</sup> the settlement will provide reasonable and quick relief to members of the settlement class without requiring expensive and time-consuming individual proceedings, and without the risk of proceeding forward with litigation. As in *In Re Hyundai*, there will be a “substantial cash payment” (in *Hyundai* “ranging from \$240 to \$1420”, *id.* at 569) with the numbers in this case being substantially higher for those with more valuable vehicles.

### 3. *The Settlement Treats All Class Members Consistently and Fairly*

As indicated above, all eligible Class Members who submit a valid claim form benefit under the proposed settlement. No segment of the eligible Class is excluded or consigned to inferior benefits. All eligible Class Members who submit a valid claim form will be compensated based on the same methodology. Because settlement benefits will be calculated based on a standardized methodology, all Class Members will receive the same value for the same magnitude of claim.

Under the settlement, and as disclosed in the notice, the Class representatives can seek an

<sup>8</sup> Based on the undersigned’s experience from prior settlements, the settlement payments to Class Members can typically range from a few hundred dollars to several thousand dollars.

award of up to \$10,000.00 in recognition of their service on behalf of the Class. Unlike unnamed Class Members, who are the passive beneficiaries of his efforts on their behalf, the representative Plaintiffs exposed himself to investigation, were deposed, and assisted Class Counsel with responses to Defendant's discovery requests and have been actively involved in the litigation. Incentive awards are routine and proper and promote the public policy of encouraging individuals to undertake the commitment and responsibility of representative lawsuits. Such awards can normally range from several hundred to many thousands of dollars, and a request for \$10,000.00 is at the modest end of the spectrum. See, e.g., *Williams Corp. v. Kaiser Sand & Gravel Co.*, No. C91 -4028 MHP, 1995 WL 1781676 (N.D. Cal. Sept. 19, 1995) ("finally, the court authorizes an additional payment of \$10,000.00 to . . . the Class Representative as compensation for its time and effort expended in the case."); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 376 (S.D. Ohio 1990) (incentive awards to compensate the class representatives for "time, risk and expenses" granted in amounts ranging from \$35,000.00 to \$55,000.00); *Bogosian v. Gulf Oil Corp.*, 621 F. Supp. 27, 32 (E.D. Pa. 1985) (stating "the propriety of allowing the modest compensation to class representatives seems obvious," and awarding \$20,000.00 to two named class representatives). It is also similar to the amount approved in prior total loss settlements, e.g. *Stier, supra* (approving \$10,000 incentive award), and similar awards in other insurance claims. E.g. *Kogan v. Allstate Fire & Cas. Ins. Co.*, No 15-cv-05559-BHS (W.D. Wa. August 16, 2021) (awarding \$10,000 to class representatives in diminished value case).

#### 4. *There Has Been No Collusion*

The settlement negotiations were conducted at arm's-length through a mediator, with the exchange of several drafts of settlement papers, which in turn were based upon those used (and approved) in prior cases including *Stier*.

At the time of final settlement approval, Class Counsel will seek Court approval of their request for an award of attorneys' fees of up to 26% and reimbursement of costs. While the actual application is not filed at this time, the likely fee request is disclosed in the notice (allowing any objections to be raised) Plaintiff's counsel note that the percentage request is in the typical 20-30% "benchmark" fee applied under Washington Law. *Hanlon*, 150 F.3d at 1029; *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047-48, 1051, n.6 (9th Cir. 2002) (holding that under *Mangold v. Calif. Pub. Utils. Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995) court would apply *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 72, 847 P.2d 440 (1993), noting that 20-30% range was typical).<sup>9</sup>

Ninth Circuit jurisprudence permits the application of "common fund" principles where (as in this case) the class of beneficiaries is identifiable, and the benefits can be traced in order to allocate the fees to the class. *Glass v. UBS Financial Services, Inc.*, 2009 WL 1360920, 3 (9th Cir. 2009) (citing *Petition of Hill*, 775 F.2d 1037, 1041 (9th Cir.1985) and *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 265 n. 39 (1975)). When viewed as a percentage of the settlement value made available, the amount of Class Counsels' fee request allowed under the Settlement Agreement is within the traditional 20% to 30% range of attorneys' fees regularly approved in class actions. See, e.g., *Awarding Attorney's Fees and Managing Fee Litigation* 68 (Federal Judicial Center 1994) ("most district courts select a percentage in the 20%

---

<sup>9</sup> Plaintiff notes that the Settlement, as in *In Re Hyundai*, is not a "sweetheart deal" and "bears none of the typical signs of collusion between class counsel and defendants, such as when class counsel "receive a disproportionate distribution of the settlement," *Bluetooth Headset*, 654 F.3d at 947 (quoting *Hanlon*, 150 F.3d at 1021), the agreement contains a "clear sailing" provision for attorney's fees "separate and apart from class funds," *id.*, or unawarded fees revert to the defendants rather than to the class, *id.*" *In Re Hyundai*, 926 F.3d at 569.

to 30% range, and the Ninth Circuit has indicated that 25% is the ‘benchmark award’”). This is recognized in the Ninth Circuit in connection with common fund cases such as class actions. “This circuit has established 25% of the common fund as a benchmark award for attorney fees.” *Hanlon.*, 150 F.3d at 1029 (citing *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir.1990)). The amount requested in this Settlement fits squarely within this range. The Court need not decide fees at this time, and the foregoing is provided only to show that the fee that can be requested falls within the range of reasonableness, which is all that is required for preliminary approval.

### VIII. THE PROPOSED NOTICE PLAN SATISFIES DUE PROCESS

Pursuant to FRCP 23(c)(2)(B),

B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

- (i) the nature of the action;
- (ii) the definition of the class certified;
- (iii) the class claims, issues, or defenses;
- (iv) that a class member may enter an appearance through an attorney if the member so desires;
- (v) that the court will exclude from the class any member who requests exclusion;
- (vi) the time and manner for requesting exclusion; and
- (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

It is well settled that in order to protect the rights of absent class members, the Court must provide the best notice practicable to class members of a potential class action settlement. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12, 70 S. Ct. 652, 94 L. Ed. 865 (1985);

1 *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-175, 94 S. Ct. 2140, 40 L. Ed.2d 732 (1974);  
 2 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed.2d  
 3 865 (1950). “Rule 23 . . . requires that individual notice in [opt-out] actions be given to all class  
 4 members ‘who can be identified through reasonable efforts’ with others given the ‘best notice  
 5 practicable under the circumstances’ . . . Due process does not require actual notice to parties  
 6 who cannot reasonably be identified.” *Eisen*, 417 U.S. at 175-76.

8 Here, the notice (Dkt#65-2) to be attached to the Preliminary Approval Order satisfies  
 9 these criteria. Copies of the Settlement Agreement, which is lengthy and cannot practicably be  
 10 incorporated into the published form of notice without causing confusion, will be available on  
 11 the website and upon request by Class Members, as *Manual* § 21.311 recommends. The notice  
 12 also includes understandable information on the claims asserted by Plaintiff in this action, as  
 13 well as the preliminary certification of this Class for settlement purposes only. As the *Manual*  
 14 concludes:  
 15

16  
 17 Even though a settlement is proposed, the original claims, relief sought, the  
 18 defenses should be outlined; such information is necessary for Class members to  
 19 make an informed decision. The notice should describe clearly the options open to  
 20 the class members and the deadlines for taking action. *Id.* at § 21.312.

21 The proposed form of Individual Notice satisfies all these standards and should be  
 22 approved. The roughly 45-day opt-out period (the exact period being determined by the date set  
 23 for final approval, on or around seventeen weeks after preliminary approval is granted) is  
 24 sufficient to allow all Class Members to review the settlement materials and reach a timely  
 25 decision to remain within the Class or opt-out, and is longer than the 30-40 day period to opt-out  
 26 which is commonly provided for and approved in consumer class action cases.

27 The last step in the settlement approval process is a final fairness hearing at which the  
 28 Court may hear all evidence and argument necessary to make its settlement evaluation.



Proponents of the Settlement may explain and describe the terms and conditions of the Settlement and offer argument in support of final approval; in addition, Class Members, or their counsel, may be heard in support of or in opposition to the Settlement Agreement. The Court will determine at the hearing whether the Settlement is entitled to final approval and final order and judgment under FRCP 23(e) may thereupon be entered.

The proposed hearing date allows sufficient time for opt-outs (if any) to be tabulated and for any response (if any objections are filed) to be prepared and filed with this Court yet allows the Settlement (if approved) to be finalized as soon as possible, while continuing to allow Class Members to submit claims until about 45 days after final approval would be granted. This will allow Class Members to receive the benefits of the Settlement as soon as possible, while allowing a longer claims period.

### IX. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully requests that the Court GRANT preliminary approval of the proposed Settlement, in the form of Order attached hereto, preliminarily certify the proposed Settlement Class, order that notice be provided to Settlement Class members, and schedule the fairness hearing on final settlement approval as the Court's calendar permits on or after seventeen (17) weeks after the date when preliminary approval is granted.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of September 2021.

The Law Offices of STEPHEN M. HANSEN, P.S.




---

STEPHEN M. HANSEN, WSBA # 15642

Scott P. Nealey (admitted pro hac vice)  
Law Office of Scott P. Nealey

315 Montgomery Street, 10th Floor,  
San Francisco, CA 94104  
snealey@nealeylaw.com

**Attorneys for Plaintiffs**

**CERTIFICATE OF SERVICE**

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the 7<sup>th</sup> day of September, 2021, I ☒ e-mailed ☐ mailed via regular U.S. mail ☐ faxed ☐ delivered by legal messenger a true and correct copy of this document to counsel of record.

DATED: September 7, 2021.

  
SARA B. WALKER, Legal Assistant